1986

State of Utah v. Richard Lawrence Jensen : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
		BRIEF OF APPELLANT
Plaintiff/Respondent,	:	
vs.	:	Case No. ~~20368~~ 21028
RICHARD LAWRENCE JENSEN,	:	Category no. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

THIS IS AN APPEAL FROM A CONVICTION OF ONE COUNT OF AGGRAVATED ROBBERY, IN VIOLATION OF UTAH CODE ANNOTATED §76-6-302(1)(a)(1953 AS AMENDED) IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JUDITH M. BILLINGS, JUDGE, PRESIDING.

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction for the offense of Aggravated Robbery, a first degree felony, in violation of Utah Code Annotated, §76-6-302(1)(a)(1953 as amended), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Judith M. Billings, Judge, Presiding.

DISPOSITION IN THE LOWER COURT

Appellant was charged by information with the offense of Aggravated Robbery, a first degree felony, in violation of Utah Code Annotated §76-6-302(1)(a)(1953 as amended). The case was tried to a jury on June 5th and 6th, 1985. On June 6th, 1985, the jury returned a verdict of guilty as charged in the information. On October 21st, 1985, appellant was ordered to serve an indeterminate sentence of five years to life in the Utah State Prison, in addition to a one year enhancement for the use of a weapon.

RELIEF SOUGHT ON APPEAL

Appellant seeks an order from this court reversing the judgment and conviction rendered against him, and remanding this

case to the Third Judicial District Court for a new trial, or in the alternative for dismissal.

ISSUE PRESENTED FOR REVIEW

The issue presented in this appeal is: was the admission at trial of evidence of other bad acts or crimes contained in letters written by the appellant prejudicial to him, thereby requiring a reversal of his conviction?

STATEMENT OF THE FACTS

The state called Mr. Harry Leisure as its first witness at trial. Mr. Leisure testified that on February 11th, 1985, he was employed by the Radio Shack Company (R. 150). Mr. Leisure indicated that at approximately 7:45 p.m. that night, he was robbed by a suspect who he later identified as the appellant. (R. 151).

When the suspect first entered the store Mr. Leisure and one other customer, Jeff Treseder, were the only persons present. (R. 151). Mr. Leisure initially approached the suspect and asked if he could assist him. (R. 151). The suspect said that he was "just looking". (R. 151-152). Mr. Leisure indicated at this point he looked into the suspect's face at a distance of approximately two feet (R. 151).

A few minutes later, after Mr. Treseder had left, the suspect approached the sales counter, showed a gun, and told Mr. Leisure to empty the cash drawer (R. 152). Mr. Leisure described the suspect as being approximately six feet to six feet one and one-half inches tall and weighing approximately 240-245 pounds. (R. 160).

After identifying appellant in open court (R. 155), Mr. Leisure stated that he had seen a photograph of appellant approximately three or four days after the robbery (R. 171). However, he also admitted that he had seen a photograph of someone else who looked familiar (R. 175-176).

Jeff Treseder then testified and confirmed that he had seen the suspect in the store on February 11th (R. 191). However, he could not identify appellant either in court or after having been shown a photograph of him (R. 195). Later, Deputy Daryl Ondrak testified that he had shown Mr. Treseder a number of photographs and that he picked out a person other than appellant, who "most closely resembled" the suspect (R. 215).

After the state rested, defense counsel called Terry Harris[1] to the stand as an alibi witness (R. 244). Miss Harris testified that she had met appellant in January and worked with him during the months of January and February, 1985. (R. 245). During this time, Miss Harris and appellant became involved in a boyfriend-girlfriend type relationship (R. 245).

She stated, with relation to this incident, that she and appellant were together at his apartment during the entire evening of February 11th (R. 249-250). She also testified that, after appellant was arrested for the instant offense, she received numerous letters from him (R. 252).

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1. This witness had originally been called by the state to identify appellant's baseball cap, which had been seized by police officers when he was arrested. (See Record, pages 225-230).

Subsequently, the state moved for the admission of one of these letters[2] (R. 275-272). Defense counsel objected to the letter being admitted. However, at this point in time, both defense counsel and counsel for the state had a discussion at the bench, the contents of which were not recorded (R. 276). After this discussion was completed, the state then moved again for introduction of the letter, and defense counsel again objected "for reasons given". (R. 276). The court then noted the objection and admitted the letter without further comment (R. 276).

Later on, the state moved for admission of a second letter[3], which was objected to by defense counsel for the same reason "as before". (R. 284). The letter was also received by the court (R. 284).

After both sides rested and the jury had been instructed and had retired to deliberate, defense counsel indicated it was her understanding that these two letters were not in fact going to the jury. (R. 397). The court responded by stating that counsel had misconstrued the ruling. (R. 397). However, counsel then noted that she had understood that these letters would not go to the jury room because one of them contained information pertaining to appellant's apparent commitment on a separate and unrelated offense arising out of Davis County. (R. 397). Finally, the court instructed defense counsel that she should have made the objection at the time the letters were admitted, thus her

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2. This letter was identified as state's exhibit #16 (see addendum).
3. This letter was identified as state's exhibit #17.

objection was not timely (R. 400). However, the record does in fact indicate that the objections were made at the proper time. The confusion arises from the fact that counsel apparently assumed, after the discussion at the bench, that the letters, because of their prejudicial content, were being admitted on the condition that these prejudicial matters would not be shown to the jury.

After deliberating for just over four hours, the jury returned a verdict of guilty as charged in the information.

SUMMARY OF ARGUMENT

It is appellant's contention that the trial court's admission of the letter in the instant case constituted reversible error. Because the letter contained reference to another crime or bad act on appellant's part, it had the effect of showing a propensity to commit crime and, therefore, its admission violated Rule 404 of the Utah Rules of Evidence.

Appellant will also argue that trial counsel did in fact comply with the "contemporaneous objection" rule, even though the basis for the objection was not placed on the record until after the jury had retired to deliberate.

ARGUMENT

This court has made it clear that evidence of prior bad acts is not admissable for the purpose of disgracing the defendant or showing a propensity to commit crime. State v. Wells, Utah, 603 P.2d 810 (1979); State v. Mason, Utah, 699 P.2d 795 (1975).

In State v. Saunders, Utah, 699 P.2d 738 (Utah 1985), the defendant was convicted of burglary, theft, possession of a

firearm by a restricted person, and of being a habitual criminal. On appeal, he argued that the trial court had committed error by refusing to sever the firearm count from the others.

In analyzing the severance issue, the supreme court noted that, because of the element of "restricted person" in the firearm offense:

> evidence that defendant was at the time of the offenses committed to the Utah State Prison and living in a halfway house would have been inadmissable at trial on the burglary and theft charges. This evidence clearly implied that defendant had committed a prior crime. (Id. at 741).

After noting that the evidence pertaining to the firearm charges was not at all relevant to the other two offenses, the court went on to explain the justification for the general principle involved:

> The basis of these limitations [Rule 55 of the former rules of evidence] on the admissibility of evidence of prior crimes is the tendency of a fact finder to convict the accused because of bad character rather than because he is shown to be guilty of the offense charged. Because of this tendency such evidence is presumed prejudicial and, absent a reason for the admission of the evidence other than to show criminal disposition, the evidence is excluded. (Id. at 741).

Appellant submits that the facts involved in the instant case fit squarely within the holding and rationale of Saunders. Here, the evidence as to appellant being the robber was heavily disputed, in that appellant presented an alibi defense in which he testified on his own behalf and denied committing the robbery.

Also, of the two persons who observed the robber on the

night of February 11th, 1985, only one was able to identify him. At the same time, the witness admitted that he felt he had somehow recognized the face of another individual whose photo was shown to him by police officers to be familiar. With this conflict in the evidence, it is clear that the introduction to the jury of appellant's apparent criminal conviction in another county could easily have caused the jury to convict him because of his bad character rather than because he was shown to have been guilty of the offense charged.

Although Saunders was decided at a time when the "old" Rule 55 of the Utah Rules of Evidence was still in effect, appellant submits that the result would still be the same under our new rules.

Rule 55 provided:

> [E]vidence that a person committed a crime or civil wrong on a specified occasion, is inadmissable to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed another crime or civil wrong on another specified occasion but...such evidence is admissable when relevant to prove some other material fact...

Rule 55 was superceded by the new Rule 404 of the Utah Rules of Evidence, which became effective on September 1, 1983. Rule 404 provides, in pertinent part:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissable to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissable for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Appellant submits that both the old Rule 55 and the new Rule 404 are virtually identical in following the general rule. In addition, the court in Saunders did not indicate, either expressly or impliedly, that cases coming before it under the new Rule 404 will end up with a different result than the old Rule 55 cases.

In State v. Holder, Utah, 649 P.2d 583 (1984), the defendant was convicted of theft of an operable motor vehicle.[4] At trial, the state introduced evidence that the defendant and another suspect were arrested while in possession of a vehicle that had been reported stolen. However, in addition, the state, over defense counsel's objection, introduced evidence that defendant and his co-defendant had earlier been involved in an aggravated robbery while in the stolen vehicle.

In reversing the defendant's conviction and ordering a new trial, the court held:

> [T]he merely cumulative character of the robbery evidence on the element of knowledge and intent regarding the theft charge is significant because it highlights the limited value this evidence has when weighed against the substantial possibility that a jury would be prejudiced by evidence of [appellant's] commission of another crime. Such evidence of the commission of other crimes must be used with extreme caution because of the prejudicial effect it may have on the finder of fact. (at 584). See State v. Kappas, 100 Utah 274, 2788, 114 P.2d 205, 207 (1941); State v. Anderton, 81 Utah 320, 323-24, 17 P.2d 917, 918 (1983); State v. McGowan, 66 Utah 223, 226-28, 241 P 314, 315-16 (1925).

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4. This case also dealt with the "old" Rule 55 rather than the new Rule 404.

Appellant respectfully submits that the instant case should be reversed as was Holder because the trial court did not use the "extreme caution" required in the instant case when it allowed this knowingly prejudicial material to be admitted and given to the jury. In fact, at one point during the trial, the court reminded the prosecutor that he would not be able to question appellant with regard to his prior misdemeanor convictions (See Record P. 250). Yet, it nevertheless admitted the letters in their entirety so as to allow the jury to see what the court had expressly forbidden the prosecutor from pursuing.

In State v. Kazda, Utah, 382 P.2d 407 (1963), the defendant appealed from a jury conviction for assault with intent to commit murder and robbery. At trial, the prosecutor was able to elicit from an F.B.I. agent statements made to him by the defendant regarding his arrest in another state for an unrelated armed robbery. In reversing, the supreme court held that this extraneous information:

> implied that the defendant was implicated in other crimes, none of them proven, and could have no other effect than to degrade the defendant and give to the jury the impression that he had a propensity for crime. See also; State v. Peterson, Utah, 457 P.2d 532 (1968); State v. Dickson, Utah, 361 P.2d 412 (1961).

Again, appellant submits that the effect of the admission of "other crimes" in the instant case probably had the effect of degrading the appellant and giving the jury the impression that he had a propensity for crime.

Appellant further submits that the error committed in the

instant case was prejudicial, thus precluding an assertion of harmless error by the state. As the court stated in Kazda, supra, it would be difficult in the instant case to "say with any degree of assurance that there would not have been a different result" in the absence of such evidence.[5] (Id. at 409). In addition, because of the extreme danger inherent in the admission of this type of evidence, this court has ruled that there is a presumption of prejudice whenever this error occurs. (See, Saunders, supra, at 741). For these reasons, appellant submits that the admission of "prior bad acts" in the instant case, cloaked with the "presumption of prejudice", was in fact prejudicial and therefore entitles him to a new trial.

Finally, the remaining issue in this argument deals with the trial court's ruling that defense counsel's objection to the prejudicial evidence was not timely. Therefore, the court overruled her objection.

Rule 103 of the Utah Rules of Evidence provides, in pertinent part:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context;...

In State v. McCardell, Utah, 652 P.2d 942 (1982), our

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5. The Kazda court was quoting State v. Dickson, 12 Utah 2d 8, 361 P.2d 412 (1961).

supreme court dealt with the "contemporaneous objection rule". There, the appellant's trial counsel had objected to the admission of a number of "mug shots" on the basis that the state had not set a proper foundation. On appeal, it was contended that the "mug shots" were objectionable because they were identified as having been taken at a police station. In addition, the reverse sides of the photos referred to the defendant's possible involvement in other crimes.

In finding that the appellant's trial counsel had failed to comply with the rule,[6] the court cited and supported the Kansas Supreme Court, which had stated that:

> The contemporaneous objection rule long adhered to in this state requires timely and specific objection to admission of evidence in order for the question of admissibility to be considered on appeal. The rule is a salutory procedural tool serving a legitimate state purpose. By making use of the rule, counsel gives the trial court the opportunity to conduct the

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6. The Rule of Evidence at the time McCardell was decided was Rule 4. It provided:

> A verdict of finding shall not be set aside nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless (a) there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection, and (b) the court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and probably had a substantial influence in bringing about the verdict or finding. However, the court in its discretion, and in the interests of justice, may review the erroneous admission of evidence even though the grounds of the objection thereto are not correctly stated.

> trial without using the tainted evidence, and thus avoid possible reversal and a new trial. Furthermore, the rule is practically one of necessity if litigation is ever to end. State v. Moore, 218 Kan. 450, 543 P.2d 923 (1975); quoting Baker v. State, 204 Kan. 607, 611, 464 P.2d 212, 216 (1970).

The McCardell court then stated that in the instant case there was no indication on the record that the trial court had been in any way alerted to the prejudicial nature on the back of the "mug shots". Based on this omission, the court followed the rule in refusing to hear the argument.

Appellant submits that the instant case is far different from the facts present in McCardell. Here, defense counsel objected to the introduction of the letters at the time they were admitted. When defense counsel brought up the issue after closing argument, she indicated that the basis for her objection had been stated at the bench. Based on that objection, she had believed the court's ruling would be to not allow the prejudicial evidence to be admitted.

The record, at this point, accurately reflected what the evidence was as well as the basis for the objection thereto. Thus, it is clear that defense counsel "directed the court's attention" to the prejudicial evidence when it was admitted. The only problem occurs where the basis is not actually put on the record until after the evidence was admitted. And it appears clear that the only reason for this omission was counsel's misunderstanding as to the court's ruling. Surely, this issue should not be precluded simply because the court and counsel had a misunderstanding as to the letters' admission.

Part of the reason for the problem in this case also originates from the nature of the questioned letters. Because the letters were read, for the most part, in open court, they undoubtedly were admissable as to the matters so divulged. However, the confusion arose as to the proposed "deletion" of the prejudicial parts from the legitimately admissable sections. Again, because counsel voiced her objections at the time the evidence was admitted and because she later was able to put her basis for such objection on the record, she therefore complied with the requirements of Rule 103 and the rule of McCardell. Thus, appellant respectfully submits that this court should decide the issue raised.

CONCLUSION

Appellant respectfully requests this court, for the reasons stated above, to reverse and remand this case to District Court for a new trial, or, in the alternative, order it to be dismissed.

Dated this _____ day of May, 1986.

EARL XAIZ
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I hereby certify that four true and correct copies of the foregoing Brief of Appellant were mailed/delivered to the Attorney General's Office, 236 Capitol Building, Salt Lake City, Utah, 84114, on this _____ day of May, 1986.

ADDENDUM A

EXHIBIT 16

Friday

Dear Teui,

Thanx for your letter. Sounds like things are going well for you. Do go to that school 'cause you can use that training for the rest of your life. I know you'll do well.

Yes, I do need your help. When we went to your sisters' house was on Sunday Feb 10. If you remember right, Feb 11 was the Monday night I left you the key to my apartment so you could wait for me until I came back from the spa. You got to my apartment around 4:30pm so you didn't have to deal with the five-o'clock traffic, and I arrived shortly after. We just sat around & watch T.V. & had a few beers. If you remember right, since you & I have been seeing eachother we've been together every Monday, 'cause that is both of our day off. And we've been getting together since just after New Years.

You don't have to get too technical or elaborate on your story. Just keep it simple & don't let them confuse you. The only thing they'll try to trip you up on, is the time. Just stick to your story. My lawyer & his investigator will be getting a hold of you to help you out. I really appreciate your concern. Tell my lawyer the reason you haven't come forward sooner is that I didn't want you to get involved if at all possible. Remember he's on my side. He'll help you out.

Yes. I've been doing alot of exercising. Around 500 pushups a day, 150 situps. We get recreation two times a day, so I get to lift some weights & play basketball. I've lost about twenty pounds in here & have cut up alot. You'll be surprised at my stamina. It's really cut up.

We are pressing charges against Dave. I called the Detectives today & they were going to his house. So

it looks like he should be in here soon. I've got a couple of guys waiting for him in here.

Well my dad came up here & visited me last Tuesday. He was a little upset. But we had a good visit. He is going out to Davis County & talk with that judge. I'm eligable for a 'review' now so things look good out there.

Babe, I'm sorry for the way I've been acting & some of the things I've wrote in my letters. Just being in here & not being able to talk to you has been real hard on me. I think about you alot & hope you'll still be around when I get out. I have good feelings about you & you're definitely my type I hope we can get to know eachother even better. If you still want to get a pixe when I get out we will. Believe me, I won't try to tie you down & whoever you want to go out with is fine.

It would just be more economicately & beneficial to us. Let's get a two-bedroom with a fireplace. I'm sure we can get along fine. Thought I'd just breeze this idea pass you. You know I won't be mad if you don't what to, 'cause you might have other plans

I heard the 'Buzzard' is supposed to open again. Do you know anything about it? Please call MIC Truck Backers or Kathleen & find out what happened to my 'check'. They still haven't sent it to me. OK. Have you like this picture on the envelope. You know I can be a little devil some times, huh?

Love you babe, & can't wait to see & be with you again. Try write a little longer letters & tell me what's happening. Even if its with Chad. OK?

Love Ya, Always

Jamy

any more news. I'll have my sister call you. Write back soon, & visit if you can. Wednesday's you can visit between 1-4 & 6-9. Saturdays 1-4pm OK.